IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

No. 159 Miscellaneous

EX PARTE GENE MITCHELL GRAY, LINCOLN ANDERSON BLAKENEY, JOSEPH HUTCH PATTERSON AND JACK ALEXANDER.

MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF MANDAMUS, PETITION FOR A WRIT OF MANDAMUS, AND BRIEF IN SUPPORT OF MOTION AND PETITION FOR MANDAMUS

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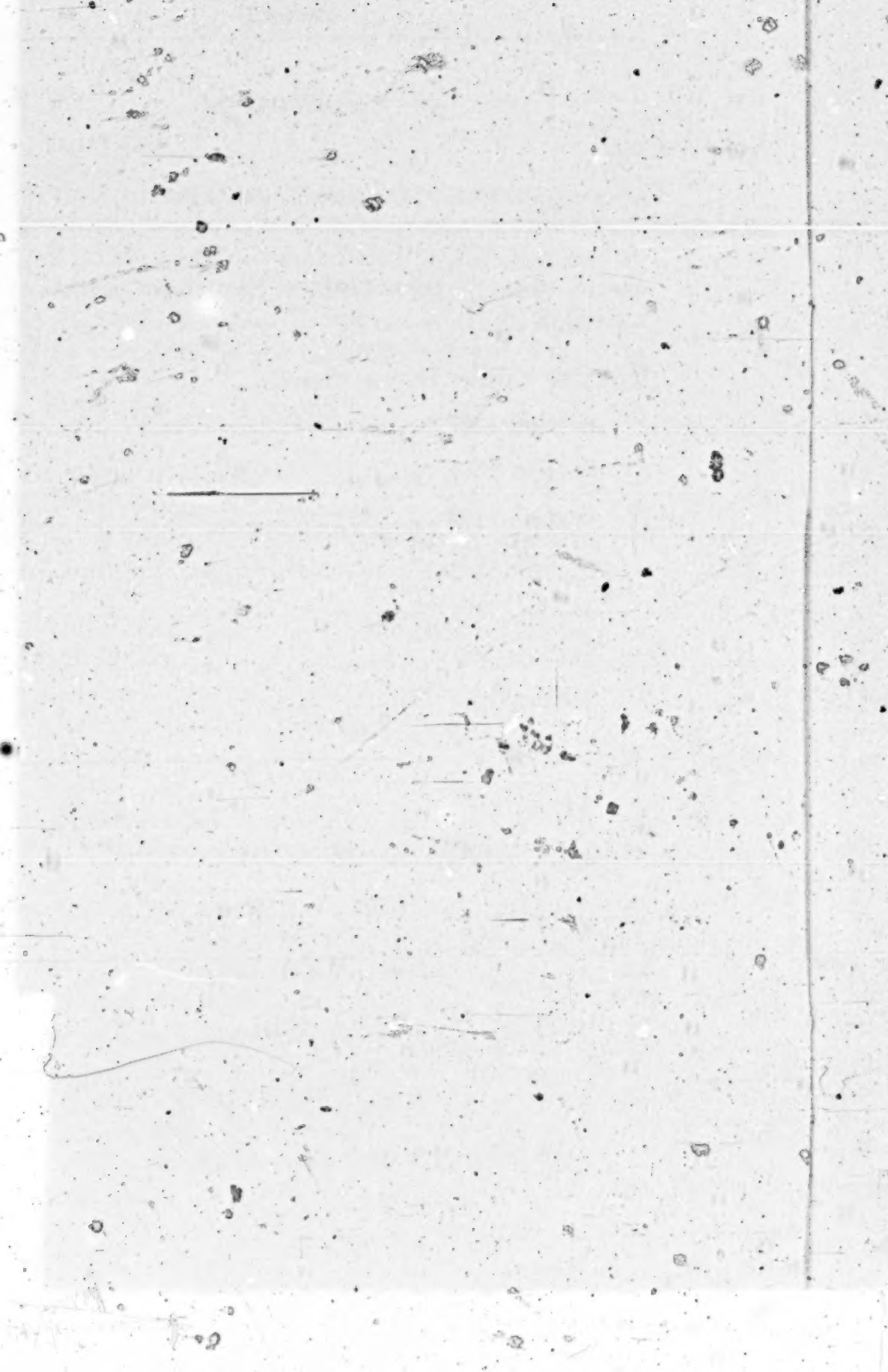

IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

No. ..... Miscellaneous

EX PARTE GENE MITCHELL GRAY, LINCOLN ANDERSON BIXKENEY, JOSEPH HUTCH PATTERSON and JACK ALEXANDER.

MOTION FOR LEAVE TO FILE A PETITION FOR WRIT OF MANDAMUS

To the Honorable Fred M. Vinson, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

Petitioners move the Court for leave to file the petition for writ of mandamus hereto annexed; and further move that an order and rule be entered and issued directing the Honorable, the United States District Court for the Eastern District of Tennessee, Northern Division, the Honorable Shackelford Miller, Jr., Circuit Judge of the United States Court of Appeals for the Sixth Circuit, the Honorable Leslie R. Darr and the Honorable Robert L. Taylor, Judges of the United States District Court for the Eastern District of Tennessee to show cause why a writ of mandamus should not be issued against them in accordance with the prayer of said petition, and why your petitioners

should not have such other and further relief in the premises as may be just and meet.

Z. Alexander Looby,
Robert L. Carter,
Thurgood Marshall,
Counsel for Petitioners.

Carl A. Cowan,
Avon N. Williams, Jr.,
Of Counsel.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. . . . . Miscellaneous

EX PARTE GENE MITCHELL GRAY, LINCOLN ANDERSON BLAKENEY, JOSEPH HUTCH PATTERSON and JACK ALEXANDER.

PETITION FOR WRIT OF MANDAMUS TO THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE, NORTHERN DIVISION, TO THE HONORABLE SHACKELFORD MILLER, JR., JUDGE, UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT, THE HONORABLE LESLIE R. DARR AND THE HONORABLE ROBERT L. TAYLOR, JUDGES OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE

To the Honorable Fred M. Vinson, Chief Justice of the United States and to the Honorable Associate Justices of the Supreme Court of the United States:

The petitioners respectfully show the following:

1. Petitioner, Gene Mitchell Gray, applied for admission to the University of Tennessee, such application being for registration and enrollment in the graduate school on the first day of the 1950 fall quarter. Petitioner, Joseph Hutch Patterson, applied for admission to the University of Tennessee, his application being for registration and enrollment on the first day of the 1951 winter quarter. Peti-

tioners, Lincoln Anderson Blakeney and Jack Alexander, sought permission to enroll in the law school of the University of Tennessee on the first day of the 1951 winter quarter.

2. Petitioners are citizens of the United States and of the State of Tennessee. They meet all lawful qualifications requisite for admission to the University to pursue the courses of study for which they applied, and their applications would have been accepted except for the fact that petitioners are Negroes.

3. The University of Tennessee is state owned and operated and is the only state institution where petitioners can receive the educational facilities, opportunities and advantages which they are seeking.

4. The Board of Trustees of the University of Tennessee met on December 4, 1950 and refused to admit petitioners to the University of Tennessee because they are Negroes. This action was taken in a formal order which reads as follows:

> "Whereas, the Constitution and the Statutes of the State of Tennessee expressly provide that there shall be segregation in the education of the races in schools and colleges in the State and that a violation of the laws of the State in this regard subjects the violator to prosecution, conviction and punishment as therein provided; and,
>
> "Whereas, this Board is bound by the Constitutional provision and the acts referred to;
>
> "Be it therefore resolved, that the applications by members of the Negro race for admission as students into The University of Tennessee be and same are hereby denied."

5. Petitioners thereupon filed a complaint in the United States District Court for the Eastern District of Tennessee pursuant to Title 28, United States Code, Sections 1331, 1343 and 2281 seeking a preliminary and permanent injunction restraining the university officials from refusing to admit them to the University of Tennessee because of their race and color, and from enforcing Article 11, Section 12 of the Constitution of Tennessee, Sections 11395, 11396, 11397 of the Code of Tennessee, and the December 4, 1950 order of the Board on the grounds that enforcement of the Constitution, statutes and order was unconstitutional in that petitioners were thereby denied the equal protection of the laws as guaranteed under the Fourteenth Amendment to the Constitution of the United States.

6. In the answer filed on behalf of the University, it was admitted that petitioners' applications had been refused pursuant to Article 11, Section 12 of the Constitution and Sections 11395, 11396 and 11397 of the Code of Tennessee, which made it unlawful for Negro and white students to attend the same schools. No question was raised with respect to petitioners' qualifications, and it was not denied that the University of Tennessee was the only state institution offering the courses of study petitioners desired to pursue. Whereupon, petitioners filed a motion for judgment on the pleadings.

7. A special three-judge district court was convened pursuant to Title 28, United States Code, Section 2284, and a hearing before such court was held in Knoxville, Tennessee on March 13, 1951.

8. On April 13, 1951, this specially constituted court rendered an opinion in which it held that the issues in-

volved in the case were not appropriate for disposition by a three-judge court and ordered the court dissolved. Its order reads in part as follows:

> "* * * the two Judges designated by the Chief Judge of the Circuit to sit with the District Judge, in whose District the action was filed, do now withdraw from the case, and that the case proceed before said District Judge in the District of its filing.'"

9. On April 20, 1951 the United States District Court for the Eastern District of Tennessee, Northern Division, without further hearing handed down an opinion in which it was held that petitioners had been denied the equal protection of the laws, and that they were entitled to be admitted to the University of Tennessee. The court, however, refused to issue an injunctive decree stating:

> "Believing that the University authorities will either comply with the law as herein declared or take the case up on appeal, the Court does not deem an injunctive order presently to be appropriate. The case, however, will be retained on the docket for such orders as may seem proper when it appears that the applicable law has been finally declared" 97 F. Supp. 463.[2]

10. Petitioners, believing that their applications for temporary and permanent injunctions to enjoin the University officials from barring their admission to the University pursuant to the state constitution, statutes and order of the Board of Trustees required decision by a district court of three judges and that the order of April 13th dissolving the district court constituted a denial of their application, appealed to this Court pursuant to Title 28, United States Code, Sections 1253 and 2101(b). Such appeal is now pending before this Court as case No. 120.

1. The opinion and order are set forth in Appendix A.
2. The opinion of the Court is set forth as Appendix B.

11. Either the order of April 13, 1951, in which the district court of three judges refused to take any action on petitioners' application for a temporary and permanent injunction, on the grounds that the cause was not appropriate for their determination, constitutes a denial of the application for a temporary and permanent injunction within the meaning of Title 28, United States Code, Section 1253, and direct appeal to this Court is appropriate.

12. Or the order of April 13, 1951 involves refusal by the court below to perform a mandatory act required by Title 28, United States Code, Section 2281, and petitioners must seek the issuance of a writ of mandamus from this Court.

WHEREFORE, petitioners pray that in the event that petitioners' direct appeal in case No. 120 is considered improper and is denied, a writ of mandamus issue from this Court directed to the Honorable the United States District Court for the Eastern District of Tennessee, Northern Division, the Honorable Shackelford Miller, Jr., Circuit Judge of the United States Court of Appeals for the Sixth Circuit, the Honorable Leslie R. Darr and the Honorable Robert L. Taylor, Judges of the United States District Court for the Eastern District of Tennessee to show cause on a day to be fixed by this Court why mandamus should not issue from this Court directing said Honorable Shackelford Miller, Jr., Circuit Judge of the United States Court of Appeals for the Sixth Circuit, and the Honorable Leslie R. Darr and the Honorable Robert L. Taylor, Judges of the United States District Court to vacate and expunge from the record and the order of April 13, 1951 dissolving the three-judge court and the subsequent action of Honorable Robert L. Taylor in which he proceeded to pass upon the issues involved in this case.

That petitioners have such additional relief and process that may be necessary and appropriate in the premises.

Respectfully submitted,

Z. Alexander Looby,
Robert L. Carter,
Thurgood Marshall,
Counsel for Petitioners.

Carl A. Cowan,
Avon N. Williams, Jr.,
Of Counsel.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

No. ..... Miscellaneous

EX PARTE GENE MITCHELL GRAY, LINCOLN ANDERSON BLAKENEY, JOSEPH HUTCH PATTERSON and JACK ALEXANDER.

BRIEF IN SUPPORT OF MOTION AND PETITION FOR WRIT OF MANDAMUS

Opinions Below

The opinion and order of the United States District Court, entered April 13, 1951, dissolving the specially constituted three-judge District Court which heard this cause is unreported and is appended hereto as Appendix A. The opinion of the United States District Court, of April 20, 1951, which held that petitioners were entitled to be admitted to the University of Tennessee but which refused to grant injunctive relief is reported in 97 F. Supp. 463 and is appended hereto as Appendix B.

Jurisdiction

Jurisdiction of this Court is invoked under Title 28, United States Code, Section 1651 (a) since the ordinary remedy of appeal and certiorari may be unavailable and

inadequate, and petitioners' right to take an appeal in this case, pursuant to Title 28, United States Code, Section 1253 is beclouded with doubt.

Questions Presented

1. Whether, after notice and hearing, the Honorable SHACKELFORD MILLER, JR., Circuit Judge of the United States Court of Appeals for the Sixth Circuit, the Honorable LESLIE R. DARR, and the Honorable ROBERT L. TAYLOR, Judges of the United States District Court for the Eastern District of Tennessee, in issuing the order of April 13, 1951 dissolving the specially-constituted three-judge court on the grounds that the issue was not appropriate for decision by a three-judge court under the provisions of Title 28, United States Code, Section 2281, failed to perform the ministerial duties of their office as required under Title 28, United States Code, Section 2281 and 2284.

2. Whether the Honorable ROBERT L. TAYLOR, who ruled on April 20, 1951 that petitioners were entitled to be admitted to the University of Tennessee but who refused to grant injunctive relief, exceeded his jurisdiction in view of the fact that the disposition of the case herein required action by a district court of three judges.

3. Whether this Court should issue a mandate ordering the Honorable SHACKELFORD MILLER, JR., Circuit Judge of the United States Court of Appeals for the Sixth Circuit, the Honorable LESLIE R. DARR and the Honorable ROBERT L. TAYLOR, Judges of the United States District Court for the Eastern District of Tennessee to make a final determination of petitioners' application for a temporary and permanent injunction to enjoin the University officials from refusing to admit them to the University of Tennessee and from enforcing Article 11, Section 12 of the Constitu-

tion of the State of Tennessee, Sections 11395, 11396, 11397 of the Code of Tennessee, and the December 4, 1950 order of the Board of Trustees on the grounds that such enforcement constitutes an unconstitutional deprivation of petitioners' rights.

Statutes Involved

The statutory provisions involved in this case are as follows:

Article 11, Section 12 of the Constitution of the State of Tennessee reads as follows:

> "* * * And the fund called the common school fund, and all the lands and proceeds thereof * * * heretofore by law appropriated by the General Assembly of this State for the use of common schools, and all such as shall hereafter be appropriated, shall remain a perpetual fund, * * * and the interest thereof shall be inviolably appropriated to the support and encouragement of common schools throughout the State, and for the equal benefit of all the people thereof. * * * No school established or aided under this section shall allow white and negro children to be received as scholars together in the same school. * * *"

Section 11395 of the Code of Tennessee reads as follows:

> "* * * It shall be unlawful for any school, academy, college, or other place of learning to allow white and colored persons to attend the same school, academy, college, or other place of learning."

Section 11396 of the Code of Tennessee reads as follows:

> "* * * It shall be unlawful for any teacher, professor, or educator in any college, academy, or

school of learning, to allow the white and colored races to attend the same school, or for any teacher or educator or other person to instruct or teach both the white and colored races in the same class, school, or college building, or in any other place or college building, or in any other place or places of learning, or allow or permit the same to be done with their knowledge, consent or procurement."

Section 11397 of the Code of the State of Tennessee reads as follows:

"* * * Any person violating any of the provisions of this article, shall be guilty of a misdemeanor, and, upon conviction, shall be fined for each offense fifty dollars, and imprisonment not less than thirty days nor more than six months."

Statement

Petitioners applied for admission to the graduate and professional schools of the University of Tennessee. They met all the requirements for admission thereto except for the fact that they are Negroes. The University of Tennessee is the only institution maintained and operated by the state which offers the courses of study which petitioners desire to pursue.

On December 4, 1950 the Board of Trustees of the University of Tennessee issued a formal order in which it denied petitioners' applications for admission to the University on the grounds that to admit them would be violative of the Constitution and statutes of the State. Petitioners filed a complaint, pursuant to Title 28, United States Code, Section 2281, to restrain the enforcement of Article 11, Section 12 of the Constitution of Tennessee; Sections 11395, 11396 and 11397 of the Code of Tennessee and the December 4, 1950 order of the Board of Trustees

on the grounds that such enforcement constituted an unconstitutional deprivation of petitioners' rights.

The University, in answer to petitioners' complaint, admitted that their applications had been refused pursuant to the Constitution and statutes of the State of Tennessee. Petitioners thereupon filed a motion for judgment on the pleadings.

A three-judge district court convened, in accordance with Title 28, of the United States Code, Sections 2281 and 2284, and met in Knoxville, Tennessee on March 13, 1951 for a hearing on the cause. On April 13, 1951 that court held that the issues raised in petitioners' complaint were not appropriate for decision by a three-judge court and ordered the matter to proceed before the District Judge of the United States District Court for the Eastern District of Tennessee, Northern Division, in which suit was filed. That court subsequently handed down an opinion holding that petitioners were entitled to be admitted to the University of Tennessee, but injunctive relief was refused on the grounds that the University officials would either comply with the law or would take an appeal. As of now, petitioners have not been admitted to the University of Tennessee nor have the University officials given any indication that petitioners will be admitted except under court mandate.

ARGUMENT

This Court may properly issue a Writ of Mandamus directing a district court of three judges to determine petitioner's right to injunctive relief applied for pursuant to Title 28, United States Code, Section 2281.

Petitioners were here refused admission to the University of Tennessee solely because of their race and color, pursuant to the December 4, 1950 order of the Board of Trustees of the University. This order was based on Article 11, Section 12 of the State Constitution and Sections 11395, 11396 and 11397 of the Code of Tennessee, which make it unlawful for Negro and white students to be educated together in the same school. Petitioners sought an injunction against enforcement of these provisions on the grounds that such enforcement deprived them of the equal protection of the laws, and hence that Article 11, Section 12 of the Constitution of Tennessee, Sections 11395, 11396 and 11397 of the Code of Tennessee and the December 4, 1950 order of the Board of Trustees of the University were unconstitutional as applied. Thus the cause was brought squarely under the provisions of Title 28, United States Code, Section 2281, and a *prima facie* case for determination by a district court of three-judges was presented. *Modern Woodmen of America* v. *Casados*, 15 F. Supp. 483 (D. C. New Mexico 1936); *Ex parte Metropolitan Water Co.*, 220 U. S. 539. The University officials, in their defense to petitioners' complaint, admitted that petitioners had been denied admission to the University pursuant to the state's constitutional provisions and statutes, enforcement of which petitioners were seeking to enjoin, which forbade the commingling together of Negro and white students in the same schools.

There can no longer be any doubt that Negro applicants must be accorded educational opportunities and advantages

under the same terms and conditions as these opportunities and advantages are afforded white students, and at the same time. *Missouri ex rel. Gaines* v. *Canada*, 305 U. S. 337; *Sipuel* v. *Board of Regents*, 332 U. S. 631; *Sweatt* v. *Painter*, 339 U. S. 629; *McLaurin* v. *Board of Regents*, 339 U. S. 637; and *Watson* v. *Board of Supervisors*, 94 L. ed. (Ad. Op.) 200, have made it clear that any form of racial segregation practiced at the professional and graduate school levels of state universities violates the equal protection clause of the Fourteenth Amendment. Here, however, the University of Tennessee was the only state institution offering the courses which petitioners desired to pursue. Under these circumstances, without regard to the present constitutional vitality of the "separate but equal" doctrine of *Plessy* v. *Ferguson*, 163 U. S. 537, with respect to graduate and professional education, Article 11, Section 12 of the Constitution of Tennessee and Sections 11395, 11396 and 11397 of the Code of Tennessee are unconstitutional as applied, in that pursuant to their provision petitioners were prohibited from being admitted to the University of Tennessee, *Missouri ex rel. Gaines* v. *Canada*, *supra*, and petitioners are entitled to injunctive relief against unconstitutional enforcement of these provisions, *McLaurin* v. *Board of Regents*, *supra*. Petitioners' cause, therefore, properly required adjudication by a district court of three judges, *Fleming* v. *Rhodes*, 331 U. S. 100; *McLaurin* v. *Board of Regents*, *supra*; *Driscoll* v. *Edison Light and Power Co.*, 307 U. S. 104; *Oklahoma Natural Gas Co.* v. *Russell*, 261 U. S. 290; *Eichholz* v. *Public Service Commission*, 306 U. S. 268; *Query* v. *United States*, 316 U. S. 486.

It is clear that petitioners would have been entitled to a writ of mandamus from this Court had the court below refused to convene a district court of three judges as provided in Title 28, United States Code, Sections 2281 and 2284. *Ex parte Collins*, 277 U. S. 565, 566, *Ex Parte Bransford*, 310 U. S. 354, 355; *Stratton* v. *St. Louis Southwest*

APPENDIX "A"

UNITED STATES DISTRICT COURT, FOR THE EASTERN DISTRICT OF TENNESSEE, NORTHERN DIVISION

Civil Action No. 1567

GENE MITCHELL GRAY, LINCOLN ANDERSON BLAKENEY, JOSEPH HUTCH PATTERSON AND JACK ALEXANDER, Plaintiffs,

v.

THE BOARD OF TRUSTEES OF THE UNIVERSITY OF TENNESSEE, ETC., ET AL., Defendants

Before MILLER, Circuit Judge, DARR and TAYLOR, District Judges.

MILLER, Circuit Judge. The plaintiffs by this action seek to enjoin the Board of Trustees of the University of Tennessee, the University of Tennessee, and certain of its officers from denying them admission to the Graduate School and to the College of Law of the University because they are members of the Negro race.

In brief, the complaint alleges that the plaintiffs are citizens of the United States and of the State of Tennessee, are residents of and domiciled in the City of Knoxville, State of Tennessee, and are members of the Negro race; that plaintiffs, Gene Mitchell Gray and Jack Alexander, are fully qualified for admission as graduate students to the Graduate School of the University; that plaintiffs Lincoln Anderson Blakeney and Joseph Hutch Patterson are fully qualified for admission as undergraduate students in law to the College of Law of the University; that the four plaintiffs are ready, willing and able to pay all lawful charges and fees, and to comply with all lawful rules and regulations, requisite to their admission; that the University of Tennessee is a corporation duly organized and existing under the laws of Tennessee, was established and is operated as a State function by the State of Tennessee, with two of its integral parts or departments being the Graduate

School and the College of Law; that it operates as an essential part of the public school system of the State of Tennessee, maintained by appropriations from the public funds of said State raised by taxation upon the citizens and taxpayers of the State including the plaintiffs; that there is no other institution maintained or operated by the State at which plaintiffs might obtain the graduate or legal education for which they have applied to the University of Tennessee; that the plaintiffs Gene Mitchell Gray and Jack Alexander applied for admission as graduate students to the Graduate School of the University and that the plaintiffs Lincoln Anderson Blakeney and Joseph Hutch Patterson applied for admission as undergraduate students in law to the College of Law of the University; and that on or about December 4, 1950, the Board of Trustees of the University refused and denied each and all of their applications for admission because of their race or color, relying upon the Constitution and Statutes of the State of Tennessee providing that there shall be segregation in the education of the races in the schools and colleges in the State. Plaintiffs contend that the action of the defendants in denying them admission to the University denies the plaintiffs, and other Negroes similarly situated, because of their race or color, their privileges and immunities as citizens of the United States, their liberty and property without due process of law, and the equal protection of the laws, secured by the 14th Amendment of the Constitution of the United States and by Section 41, Title 8, United States Code.

The defendants, by answer, state that they are acting under and pursuant to the Constitution and the Statutes of the State of Tennessee, by which they are enjoined from permitting any white and negro children to be received as scholars together in the same school; that provision has been made by Tennessee Statutes to provide professional education for colored persons not offered to them in state colleges for Negroes but offered for white students in the University of Tennessee; that the State of Tennessee, under its Constitution and Statutes and under its police power, has adopted reasonable regulations for the operation of its

institutions based upon established usages, customs and traditions, and such regulations being reasonable are not subject to challenge by the plaintiffs; and that the 14th Amendment of the Constitution of the United States did not authorize the Federal Government to take away from the State the right to adopt all reasonable laws and regulations for the preservation of the public peace and good order under the inherent police power of the State.

The plaintiffs requested a hearing by a three-judge court under the provisions of Title 28 U. S. Code, Section 2281, and moved for judgment on the pleadings in that the pleadings showed that there was no dispute as to any material fact and they were entitled to judgment as a matter of law. The present three-judge court was designated and in due course the case was argued before it.

We are of the opinion that the case is not one for decision by a three-judge court. Title 28 U. S. Code, Section 2281, requires the action of a three-judge court only when an injunction is issued restraining the action of any officer of the State upon the ground of the unconstitutionality of such statute. We are of the opinion that the case presents a question of alleged discrimination on the part of the defendants against the plaintiffs under the equal protection clause of the 14th Amendment, rather than the unconstitutionality of the statutory law of Tennessee requiring segregation in education. As such, it is one for decision by the District Judge instead of by a three-judge court.

The plaintiffs rely chiefly upon the decisions of the Supreme Court in *Missouri* v. *Canada*, 305 U. S. 337, *Sipuel* v. *Board of Regents*, 332 U. S. 631, *Sweatt* v. *Painter*, 339 U. S. 629 and *McLaurin* v. *Oklahoma State Regents*, 339 U. S. 637, in which State Universities were required to admit qualified negro applicants. In each of those cases the plaintiff was granted the right to be admitted to the State University on equal terms with white students because of the failure of the State to furnish to the negro applicant educational facilities equal to those furnished white students at the State University. The rulings therein are based upon illegal discrimination under the equal protection clause of the 14th Amendment, not upon the unconstitu-

tionality of a State statute. In *Sweatt* v. *Painter*, supra, the Court expressly pointed out (339 U. S. at Page 631) that it was eliminating from the case the question of constitutionality of the State statute which restricted admission to the University to white students. Those cases did not change the rule, previously laid down by the Supreme Court, that State legislation requiring segregatoin was not unconstitutional because of the feature of segregation, *Plessy* v. *Ferguson*, 163 U. S. 537; *McCabe* v. *Atchison T. & S. F. Ry. Co.*, 235 U. S. 151, provided equal facilities were furnished to the segregated races. In *Sweatt* v. *Painted*, supra, the Supreme Court declined (339 U. S. at Page 636) to re-examine its ruling in *Plessy* v. *Ferguson*, supra. In *Berea College* v. *United States*, 211 U. S. 45, and *Gong Lum* v. *Rice*, 275 U. S. 78, state segregation statutes dealing specifically with education were not held to be unconstitutional. The validity of such legislation was recognized in *Missouri* v. *Canada*, supra, wherein the Court stated (305 U. S. at page 344)—"The State has sought to fulfill that obligation by furnishing equal facilities in separate schools, a method the validity of which has been sustained by our decisions." In that case, as well as in *Sweatt* v. *Painter*, supra, there were State statutes which required segregation for the purpose of higher education, but the decisions in those cases did not declare those statutes unconstitutional.

By Chapter 43 of the Public Acts of 1941, the State of Tennessee authorized and directed the State Board of Education and the Commissioner of Education to provide educational training and instruction for negro citizens of Tennessee equivalent to that provided at the University of Tennessee by the State of Tennessee for white citizens of Tennessee, such training and instruction to be made available in a manner to be prescribed by the State Board of Education and the Commissioner of Education, provided, that the members of the negro race and white race should not attend the same institution or place of learning. The Supreme Court of Tennessee has held that Act to be mandatory in character. *State ex rel. Michael* v. *Witham*, 179 Tenn. (15 Beeler) 250. Such legislation, specifically requiring equal educational training and instruction for white and negro

citizens, appears to go further than did some of the State Statutes involved in the Supreme Court cases above referred to, which were not declared unconstitutional in those cases. In our opinion, this case does not turn upon the unconstitutionality of the state statutes, but presents the same issue as was presented to the Supreme Court in *Missouri* v. *Canada*, supra, *Sipuel* v. *Board of Regents*, supra, *Sweatt* v. *Painter*, supra, and *McLaurin* v. *Oklahoma State Regents*, supra, namely, the question of discrimination under the equal protection clause of the 14th Amendment. Accordingly, this case, at least in its present stage, is one for decision by the District Judge, in the district of its filing, on the issue of alleged discrimination against the plaintiffs under the equal protection clause of the 14th Amendment. Such an issue does not address itself to a three-judge court. *Ex parte Bransford*, 310 U. S. 354; *Ex parte Collins*, 277 U. S. 565; *Rescue Army* v. *Municipal Court*, 331 U. S. 549, 568-574.

The two Judges designated by the Chief Judge of the Circuit to sit with the District Judge in the hearing and decision of this case do now accordingly withdraw from the case, which will proceed in the District Court where it was originally filed. See Lee v. Roseberry, 94 Fed. Supp. 324, 328.

UNIITED STATES DISTRICT COURT FOR THE EASTERN DIVISION OF TENNESSEE, NORTHERN DIVISION

1567

GENE MITCHELL GRAY, LINCOLN ANDERSON BLAKENEY, JOSEPH HUTCH PATTERSON and JACK ALEXANDER, *Plaintiffs*,

v.

THE BOARD OF TRUSTEES OF THE UNIVERSITY OF TENNESSEE, ETC., et al., *Defendants*

ORDER

Before Miller, Circuit Judge; Darr and Taylor, District Judges

This case was heard on the record, briefs and argument of counsel for respective parties.

And the Court being of the opinion that the issue involved is alleged unjust discrimination against the plaintiffs under the Equal Protection Clause of the Fourteenth Amendment of the Constitution of the United States, and not the constitutionality of certain statutes of the State of Tennessee, referred to in the pleadings;

And such issue not being one for decision by a three-judge court under the provisions of Section 2281, Title 28, U. S. Code;

It is ordered that the two Judges designated by the Chief Judge of the Circuit to sit with the District Judge, in whose District the action was filed, do now withdraw from the case, and that the case proceed before said District Judge in the District of its filing.

(S.) SHACKELFORD MILLER, JR.,
Circuit Judge;

(S.) LESLIE R. DARR,
District Judge;

(S.) ROBT. L. TAYLOR,
District Judge.

APPENDIX "B"

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE, NORTHERN DIVISION

Civil No. 1567

GENE MITCHELL GRAY et al.

vs.

UNIVERSITY OF TENNESSEE et al.

This case was heard by a three-judge court on the record, briefs and argument of counsel for the respective parties on plaintiffs' motion for summary judgment in their favor under Rule 56 of the Federal Rules of Civil Procedure.

In an opinion by Circuit Judge Miller, in which Chief District Judge Darr and District Judge Taylor of the Eastern District of Tennessee, concurred, the Court held that the issue involved is alleged unjust discrimination against the plaintiffs under the equal protection clause of the Fourteenth Amendment of the Constitution of the United States and not the constitutionality of the Tennessee statutes and constitutional provisions referred to in the complaint. Following this opinion and the order entered pursuant thereto, Judge Miller and Judge Darr withdrew from the case, which is now before this Court for decision on the motion.

Plaintiffs Gray and Alexander have applied for admission to the Graduate School and plaintiffs Blakeney and Patterson have applied for admission to the College of Law, of the University of Tennessee. All admittedly are qualified for admission, except for the fact that they are negroes.

The matter of their applications was referred by University authorities to the Board of Trustees, who disposed of the matter by the following resolution:

> "Whereas, the Constitution and the statutes of the State of Tennessee expressly provide that there shall be segregation in the education of the races in schools

and colleges in the State and that a violation of the laws of the State in this regard subjects the violator to prosecution, conviction, and punishment as therein provided; and,

"Whereas, this Board is bound by the Constitutional provision and acts referred to;

"Be it therefore resolved, that the applications by members of the Negro race for admission as students into The University of Tennessee be and the same are hereby denied."

Following the indicated action by the Board of Trustees, plaintiffs filed their joint complaint for themselves and on behalf of all negro citizens similarly situated, praying for a temporary and, after hearing, a permanent order restraining the defendants from executing the exclusion order of the Board of Trustees against the plaintiffs, or other negroes similarly situated, and from all action pursuant to the constitution and statutes of the State of Tennessee, and the custom or usage of the defendants, respecting the requirement of segregation of whites and negroes in state-supported educational institutions and exclusion of negroes from the University of Tennessee, their references being to Article 11, sec. 12, of the state constitution, to sections 2403.1, 2403.3, 11395, 11396, and 11397 of the Tennessee Code, and the custom and usage of defendants of excluding negroes from all colleges, schools, departments, and divisions of the University of Tennessee, including the Graduate School and the College of Law.

Defenses interposed are nine in number, but in substance they are these: That defendants, in rejecting the applications of the plaintiffs, were and are obeying the mandates of the segregation provisions of the constitution and laws of the State of Tennessee; that those provisions are in exercise of the police powers reserved to the states and are valid, the Fourteenth Amendment and laws enacted thereunder to the contrary notwithstanding, and that these plaintiffs have no standing to bring this action for the reason that they have not exhausted their administrative remedies under the equivalent facilities act of 1941, Code section

2403.3. The plaintiffs, after alleging in their complaint that the University of Tennessee maintains a Graduate School and a College of Law which offer to white students the courses sought by plaintiffs, make the following specific allegation, which defendants, for failure to deny, admit: "There is no other institution maintained or operated by the State of Tennessee at which plaintiffs might obtain the graduate and/or legal education for which they respectively have applied to The University of Tennessee."

It is, of course, recognized that the Constitution of the United States is one of enumerated and delegated powers. To remove original doubt as to the character of federal powers, the states adopted the Tenth Amendment, which provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." The Constitution contains no specific delegation of police powers, and those powers are accordingly reserved. But a glance discloses that, in relation to the Tenth Amendment, the Constitution contains two groups of powers, namely, the previously-delegated powers and the subsequently-delegated powers. By adoption of the Fourteenth Amendment, following adoption of the Tenth Amendment, the states consented to limitations upon their reserved powers, particularly in the following respects: ". . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws . . ."

It is recognized that "the police power of a state extends beyond health, morals and safety, and comprehends the duty, *within constitutional limitations*, to protect the well-being and tranquility of a community." Kovacs v. Cooper, 336 U. S. 77, 83. (Italics supplied). States "have power to legislate against what are found to be injurious practices in their internal commercial and business affairs, *so long as their laws do not run afoul of some specific constitutional prohibition, or of some valid federal law.*" Whitaker v. North Carolina, 335, U. S. 525, 536. (Italics supplied).

In the foregoing quotations, the italicized portions point up the limitations upon the exercise of a state's police powers.

Segregation by law may, in a given situation, be a valid exercise of the state's police powers. It has been so recognized with respect to schools. Gong Lum et al v. Rice et al, 275 U. S. 78. Also, as to segregation on intrastate trains. Plessy v. Ferguson, 163 U. S. 537. But where enforcement by the state of a law ran afoul of the Fourteenth Amendment by denying members of a particular race or nationality equal rights as to property or the equal protection of the laws, the state action has been condemned. This was the result where state law discriminated against aliens as to the privilege of employment. Truax v. Raich, 239 U. S. 33. The same result was reached as to enforcement of restrictive covenants in deeds, Shelley et ux v. Kraemer et ux, 334 U. S. 1; in the housing segregation cases, Richmond v. Deans, 4 Cir., 37 F. 2d 712, affirmed 281 U. S. 704; Buchanan v. Warley, 245 U. S. 60: and in the cases where segregation has resulted in inequality of educational opportunities for negroes, Sweatt v. Painter et al, 339 U. S. 629; McLaurin v. Oklahoma State Regents, 339 U. S. 637. From these cases it appears to be well settled that exercise of the state's police powers ceases to be valid when it violates the prohibitions of the Fourteenth Amendment. The defense on this ground, therefore, fails.

The second question is whether the plaintiffs have present standing to bring this action. To understand the defense interposed here, it is desirable to look at the historical background of the act of 1941, of which the Court takes judicial notice.

On October 18, 1939, six negroes applied for admission to the University of Tennessee, four to the Graduate Department and two to the College of Law. Being denied admission, they filed their separate petitions for mandamus in the Chancery Court of Knox County, Tennessee, to require their admission. Following denial of the petitions in a consolidated proceeding, an appeal was taken to the Supreme Court of Tennessee, where the action of the Chancellor was affirmed by opinion filed November 7, 1942. State

ex rel. Michael et al. v. Witham et al., 179 Tenn. 250. The case was not disposed of by the Chancellor on its merits, but on the ground that it had become moot. While the case was pending in the Chancery Court, the state legislature enacted the act of 1941, now carried in the Code as sec. 2403[illegible], and entitled, *Educational facilities for negro citizens equivalent to those provided for white citizens:*

> "The state board of education and the commissioner of education are hereby authorized and directed to provide educational training and instruction for negro citizens of Tennessee equivalent to that provided at the University of Tennessee by the State of Tennessee for white citizens of Tennessee. Such training and instruction shall be made available in a manner to be prescribed by the state board of education and the commissioner of education; provided, that members of the negro race and white race shall not attend the same institution or place of learning. The facilities of the Agricultural and Industrial State College, and other institutions located in Tennessee, may be used when deemed advisable by the state board of education and the commissioner of education, insofar as the facilities of same are adequate."

Following enactment of the statute a supplemental answer was filed in the case then pending, in which it was averred that pursuant to the Act certain committees had been appointed by the state board of education, with instructions to report at the board's next regular meeting, an averment which suggested that the act of 1941 was to be made operative expeditiously.

The Supreme Court of Tennessee, in affirming the Chancellor's dismissal of the consolidated case, construed the act of 1941 to be mandatory in character. "No discretion whatever is vested in the State Board of Education under the Act as to performance of its mandates. The manner of providing educational training and instruction for negro citizens equivalent to that provided for white citizens at the University of Tennessee is for the Board of Education to determine in its sound discretion, but the furnishing of such

equivalent instruction is mandatory." State ex rel. Michael et al. v. Witham et al., 179 Tenn. 250, 257.

The court also said at page 257: "Upon the demand of a negro upon the State Board of Education for training and instruction in any branch of learning taught in the University of Tennessee, it is the duty of the Board to provide such negro with equal facilities of instruction in such subjects as that enjoyed by the students of the University of Tennessee. The State Board of Education is entitled to reasonable advance notice of the intention of a negro student to require such facilities . . . No such advance notice by appellants is shown in the record."

At page 258, the court further said: "It does not appear that the State Board of Education is seeking in any way to evade the performance of the duties placed upon it by Chapter 43, Public Acts 1941, or that it is lacking sufficient funds to carry out the purposes of the Act. The state having provided a full, adequate and complete method by which negroes may obtain educational training and instruction equivalent to that provided at the University of Tennessee, a decision of the issues made in the consolidated causes becomes unnecessary and improper. The legislation of 1941 took no rights away from appellants; on the contrary the right to equality in education with white students was specifically recognized and the method by which those rights would be satisfied was set forth in the legislation. What more could be demanded?"

By failure to deny the allegations of the complaint, defendants admit that the directive, though mandatory, has not been carried out. Nevertheless, it is urged by defendants that these plaintiffs have no standing here until they have petitioned the state board of education to furnish the equivalent educational training and instruction for negroes provided for by the act. The Supreme Court of the state noted in its opinion that the then applicants for admission to the University of Tennessee had given to the state board "no such advance notice" of a desire to be furnished facilities under the act. That omission is understandable here for the reason that their applications for admission to the University of Tennessee had not been finally disposed of by

the courts, and the need of their applying to the state board had not been established.

Since the enactment of the Act of 1941 and the decision in State ex rel. Michael et al. v. Witham et al., 179 Tenn. 250, the Supreme Court of the United States has emphasized the pronouncement of one of its older cases as to a particular element of equal protection. In Missouri ex rel. Gaines v. Canada, 305 U. S. 337, it appeared that Lincoln University, a state-supported school for negroes, intended to establish a law school. As to this intention the court said: ". . . it cannot be said that a mere declaration of purpose, still unfulfilled, is enough." Missouri ex rel. Gaines v. Canada, 305 U. S. 337, 346. In the same case, at page 351, the court said: "Here, petitioner's right was a personal one. It was as an individual that he was entitled to the equal protection of the laws, and the State was bound to furnish him within its borders facilities for legal education substantially equal to those which the State there afforded for persons of the white race, . . ." Later declarations indicate that the two quotations should be read together and that when so read they state the requirement of equality of opportunity to be personal and immediate.

In Fisher v. Hurst, 333 U. S. 147, the court emphasized its position that equality of opportunity in education means present equality, not the promise of future equality. This re-emphasized the necessity of equality as to time of an earlier decision, where the court said: "The State must provide it for her in conformity with the equal protection clause of the Fourteenth Amendment and provide it as soon as it does for applicants of any other group." Sipuel v. Board of Regents of the University of Oklahoma et al., 332 U. S. 631. In the holding in McLaurin v. Oklahoma State Regents, 339 U. S. 637, 642, the court said: "We conclude that the conditions under which this appellant is required to receive his education deprive him of his personal and present right to the equal protection of the laws." That equality of educational opportunity for negroes means present equality was emphasized once more in Sweatt v. Painter et al., 339 U. S. 629, 635: "This Court has stated unanimously that 'The State must provide (legal education)

Railway Co., 282 U. S. 10, 16. It is further clear that if this is a proper cause for adjudication by a district court of three judges that Judge Taylor's disposition of the cause in his April 20th opinion is a nullity, *Stratton* v. *St. Louis Southwest Railway Co.*, *supra*, and certainly he, sitting alone, could not have granted the injunctive relief for which petitioners applied.

The basic error, however, of which petitioners complain is the April 13th order of the district court of three judges, which had been properly convened and which, on March 13, 1951 had held a hearing on petitioners' application for injunctive relief. Where a district court of three judges refused to act on a question in which their determination is made mandatory by statutes, this Court may issue a writ of mandamus requiring them to do so. In the matter of the *Public National Bank of New York*, 278 U. S. 101; *Osage Tribe of Indians* v. *Ickes*, 45 F. Supp. 178, 186, 187 (DC. 1942). It is submitted that a writ of mandamus should be granted in this case.

Conclusion

The question, however, is not free from doubt since the order of April 13th dissolving the specially constituted court and ordering the cause to proceed before a district judge sitting alone could be considered a denial of petitioners' application for a temporary and a permanent injunction. If so considered, petitioners' proper recourse is to invoke Title 28, United States Code, Section 1253, and appeal directly to this Court. See *Smith* v. *Wilson*, 273 U. S. 388; *Oklahoma Gas & Electric Co.* v. *Oklahoma Packing Co.*, 292 U. S. 386. Petitioners are not certain whether direct appeal or application to this Court for a writ of mandamus is their proper procedural remedy. Having already taken an appeal to this Court, therefore, petitioners

are here making application for the issuance of a writ of mandamus in the event their appeal should be considered procedurally improper.

Respectfully submitted,

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[Appendices Follow]

for (petitioner) in conformity with the equal protection clause of the Fourteenth Amendment and provide it as soon as it does for applicants of any other group'. Sipuel v. Board of Regents, 332 U.S. 631, 633." In view of these recent declarations of the Supreme Court of the United States, this Court is forced to conclude that the defense of exhaustion of administrative remedies fails.

The Court finds that under the Gaines, Sipuel, Sweatt and McLaurin cases heretofore cited, these plaintiffs are being denied their right to the equal protection of the laws as provided by the Fourteenth Amendment and holds that under the decisions of the Supreme Court the plaintiffs are entitled to be admitted to the schools of the University of Tennessee to which they have applied for admission. Believing that the University authorities will either comply with the law as herein declared or take the case up on appeal, the Court does not deem an injunctive order presently to be appropriate. The case, however, will be retained on the docket for such orders as may seem proper when it appears that the applicable law has been finally declared.

(S.) Robt. L. Taylor,
United States District Judge.